

**BEFORE THE FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C.**

**IN RE:**

<b>PETITION OF FRONTIER</b>	)	<b>WC DOCKET NO. 06-6</b>
<b>COMMUNICATIONS OF AMERICA,</b>	)	
<b>INC. FOR PREEMPTION AND</b>	)	
<b>DECLARATORY RULING</b>	)	

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**TENNESSEE COOPERATIVES' COMMENTS IN OPPOSITION TO THE  
PETITION OF FRONTIER COMMUNICATIONS OF AMERICA, INC.  
FOR PREEMPTION AND DECLARATORY RULING**

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Yorkville Telephone Cooperative, Inc.

February 21, 2006

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Bledsoe Telephone Cooperative, DTC Communications, Highland Telephone Cooperative, Inc., North Central Telephone Cooperative, Inc., Twin Lakes Telephone Cooperative Corporation, West Kentucky Rural Telephone Cooperative, Inc. and Yorkville Telephone Cooperative, Inc. (collectively the "Intervening Cooperatives"), by and through their undersigned counsel, respectfully submit these Comments in Opposition to the Petition of Frontier Communications of America, Inc. for Preemption and Declaratory Ruling ("*Frontier's FCC Petition*" or "*FCC Petition*"), pursuant to the pleading cycle established in the Federal Communications Commission's ("FCC") January 19, 2006, Public Notice.<sup>1</sup>

For the reasons set forth below, the Intervening Cooperatives respectfully submit that this matter should either be denied or dismissed.

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<sup>1</sup> The Intervening Cooperatives do not waive any arguments or defenses not set forth herein and reserve the right to assert the same.

## I.

### TRAVEL OF THE CASE

Frontier Communications, Inc. (“Frontier Communications”) filed its *Petition Of Frontier Communications, Inc. For Declaratory Ruling That It Can Provide Competing Services In The Territory Currently Served By Ben Lomand Rural Telephone Cooperative, Inc.* (“Frontier’s TRA Petition” or “TRA Petition”) before the Tennessee Regulatory Authority (“Authority” or “TRA”) on or about October 26, 2004.<sup>2</sup> Ben Lomand Rural Telephone Cooperative, Inc. (“Ben Lomand Cooperative”) submitted its *Answer and Motion to Dismiss of Ben Lomand Rural Telephone Cooperative, Inc.* on or about December 4, 2004. The Authority convened a contested case on December 13, 2004, and memorialized its decision regarding the same in its February 16, 2005, *Order Convening A Contested Case Proceeding and Appointing A Hearing Officer* (TRA Docket No. 04-00379). In its determination to convene a contested case, the Authority did not address or otherwise resolve Ben Lomand Cooperative’s pending motion to dismiss.<sup>3</sup> Thereafter, the Intervening Cooperatives were individually granted permission to intervene and to participate in TRA Docket No. 04-00379.

A Pre-Hearing Status Conference was held on April 27, 2005. At the Status Conference, the Pre-Hearing Officer directed the parties to file briefs addressing threshold issues on June 8, 2005, and reply briefs on June 15, 2005. After the submission of briefs regarding threshold

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<sup>2</sup> According to *Frontier’s TRA Petition*, Frontier Communications was formerly known as Citizens Telecom. *In Re: Petition of Frontier Communications, Inc. for a Declaratory Ruling*, Petition of Frontier Communications, Inc. for Declaratory Ruling That It Can Provide Competing Services in Territory Currently Served by Ben Lomand Rural Telephone Cooperative, Inc., TRA Docket No. 04-00379, p. 1 (Oct. 25, 2004).

<sup>3</sup> *In Re: Petition of Frontier Communications, Inc. for a Declaratory Ruling*, Transcript of Proceeding, TRA Docket No. 04-00379, p. 2 (April 27, 2005, Status Conference) (hereinafter the “April 2005 TRA Transcript”) (“And the panel voted on December the 13<sup>th</sup> to convene a contested case and appointed a hearing officer for prehearing matters. They did not consider the motion to dismiss that was filed.”) (Comments of Pre-Hearing Officer). *See also In Re: Petition of Frontier Communications, Inc. for a Declaratory Ruling*, Order Establishing Briefing Schedule, TRA Docket No. 04-00379, p. 2 (May 27, 2005) (“Order Establishing Briefing Schedule”) (“At a status conference held on April 27, 2005, the Hearing Officer found that the panel had not addressed the issues contained in the *Motion to Dismiss*.”). The Order Establishing Briefing Schedule is attached hereto as **Exhibit A**.

issues, the parties presented oral arguments before the Authority on June 27, 2005, and the Authority took the matter under advisement. On November 7, 2005, the presiding Authority panel publicly deliberated on the pending threshold issues in TRA Docket No. 04-00379 and unanimously voted to dismiss *Frontier's TRA Petition* for failure to state a claim as a matter of law.<sup>4</sup>

On or about December 14, 2005, Frontier Communications of America, Inc. ("Frontier") filed its Petition for Preemption and Declaratory Ruling before the FCC.

## II.

### **DECISIONS OF THE TENNESSEE REGULATORY AUTHORITY**

#### *a. The Authority's May 27, 2005, Order Establishing Briefing Schedule (The Authority's April 27, 2005, Status Conference)*

As noted earlier, in its December 4, 2004, responsive pleading before the TRA, Ben Lomand Cooperative moved the agency to dismiss *Frontier's TRA Petition*. In sum, Ben Lomand Cooperative's motion to dismiss was based on the ground that the TRA did not have jurisdiction to consider the requested declaratory ruling.<sup>5</sup> If the TRA concluded that it had appropriate jurisdiction, Ben Lomand Cooperative contended below that Tennessee's practice, public policy, and law do not permit Frontier Communications to provide service in the geographic area traditionally served by Ben Lomand Cooperative. As determined at the April

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<sup>4</sup> *In Re: Petition of Frontier Communications, Inc. for a Declaratory Ruling*, Transcript of Excerpt of Authority Conference, TRA Docket No. 04-00379, pp. 2-5 (Nov. 7, 2005) ("Nov. 2005 TRA Deliberations"). A copy of the November 7, 2005 TRA deliberations transcript is attached to *Frontier's FCC Petition*.

<sup>5</sup> *In Re: Petition of Frontier Communications, Inc. for a Declaratory Ruling*, Answer and Motion to Dismiss of Ben Lomand Rural Telephone Cooperative, Inc., TRA Docket No. 04-00379 (Dec. 8, 2004).

27, 2005, TRA Pre-Hearing Status Conference, the former question was determined to be a threshold issue necessary for resolution prior to consideration of the latter issue.<sup>6</sup>

Consistent with the directives of the Pre-Hearing Officer, Ben Lomand Cooperative submitted the Initial Brief of Ben Lomand Rural Telephone Cooperative, Inc. “to address the threshold issues . . . including jurisdiction, and is not to address or attempt to resolve the dispute of this matter on its merits.”<sup>7</sup> Moreover, Ben Lomand Cooperative specifically reserved the right to be heard on the non-threshold question(s) if the matter was not dismissed on jurisdictional grounds.<sup>8</sup> It is uncontroverted that Frontier Communications acknowledged this two-pronged process at the April 27, 2005, Pre-Hearing Status Conference as well.<sup>9</sup> In fact, it was contemplated that the second prong of the two-step process might involve both discovery and live testimony.<sup>10</sup>

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<sup>6</sup> See, e.g., April 2005 TRA Transcript at 6 (“So when we’re talking about the motion to dismiss and we’re talking about the threshold issue of whether or not the Authority has jurisdiction, we’re basically talking about the same thing.”) (Comments of Pre-Hearing Officer). See also *id.* at 9 (“[E]ncompassed in the motion to dismiss . . . is the threshold jurisdictional issue.”) (Comments of the Pre-Hearing Officer).

<sup>7</sup> *In Re: Petition of Frontier Communications, Inc. for a Declaratory Ruling*, Initial Brief of Ben Lomand Rural Telephone Cooperative, Inc., TRA Docket No. 04-00379, p. 1 (June 8, 2005) (hereinafter the “Initial Brief of Ben Lomand Cooperative”). See also *id.* (“As a brief to address the threshold issues, this brief’s purpose is not to argue whether telephone cooperatives can have competition.”).

<sup>8</sup> Initial Brief of Ben Lomand Cooperative at 2-3. See also April 2005 TRA Transcript at 6-7 (“And I prefer a two-step process[.]”) (Counsel for Ben Lomand Cooperative); and *id.* at 15-16 (“I don’t think we are opposed to, as [counsel for Frontier Communications] has suggested, addressing the motion to dismiss, which includes several issues and the jurisdictional component in one filing. But that excludes the merits[.]”) (Counsel for the Intervening Cooperatives).

<sup>9</sup> April 2005 TRA Transcript at 10-11 (“[T]he first item to be determined, which would be determined early by the Authority, is the motion to dismiss? . . . The jurisdictional point.”) (Counsel for Frontier Communications); and *id.* at 12 (“[T]he threshold jurisdictional issue is distinguishable from the statutory provisions that do address co-ops[.]”) (Counsel for Frontier Communications). See also, e.g., *id.* at 7 (“[T]he agency has oftentimes bifurcated a case such as this and determined the threshold issues first before proceeding to the issues on the merits.”) (Counsel for the Intervening Cooperatives); *In Re: Petition of Frontier Communications, Inc. for a Declaratory Ruling*, Transcript of Authority Conference, TRA Docket No. 04-00379, pp. 19-20 (June 27, 2005) (Oral Arguments) (“I think jurisdiction is the issue that’s before you. . . . And that doesn’t even get into the federal law.”) (Counsel for Frontier Communications).

<sup>10</sup> *Id.* at 7.

Hence, it was determined at the April 27, 2005, Pre-Hearing Status Conference, and such with the understanding of all parties, that the case would be, in effect, bifurcated.<sup>11</sup> First, the presiding panel would consider the jurisdictional component of Ben Lomand Cooperative's motion to dismiss, including failure to state claim upon which relief can be granted. If the matter was not dismissed on said or related grounds, then the panel would proceed, with proper procedure, to the merits of the case.

*b. The Authority's November 7, 2005, Deliberations*

Subsequent to oral arguments, and pursuant to public notice, on November 7, 2005, the presiding panel deliberated the threshold issues in TRA Docket No. 04-00379. While each of the three (3) presiding TRA Directors (Commissioners) made oral comments, the motion submitted by Director Kyle passed unanimously.<sup>12</sup> In part, Director Kyle moved as follows:

I would move to grant the motion to dismiss . . . with respect to the petition for declaratory ruling submitted by Frontier Communications, Inc. I find that Frontier . . . when requesting authority to provide competing telephone service was not granted statewide approval to provide competing service. The 1996 order did not extend Citizens authority statewide to enter into territories of small telephone carriers or cooperatives, and it was clearly not my intent nor was it supported in the record.

I believe it is appropriate to dismiss the petition of Frontier at this time as it simply asks for relief that cannot be granted given its **current** certificate of convenience and necessity.<sup>13</sup> (emphasis added).

The above-stated motion passed unamended.<sup>14</sup> In agreeing with Director Kyle, Director Tate noted as follows:

[A]t least two other companies have come before us to expand their CCNs to enable it to extend service into previously restricted areas. So I'm not in any way prejudging that issue and whether or not it might come before us in the future[.]<sup>15</sup>

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<sup>11</sup> Order Establishing Briefing Schedule at 2 ("After a lengthy discussion, it was determined that the parties would first file briefs addressing the threshold issues contained in the Motion to Dismiss for the panel's consideration. The remainder of the procedural schedule will depend upon the decision by the panel regarding those threshold issues.").

<sup>12</sup> Nov. 2005 TRA Deliberations at 2-7.

<sup>13</sup> *Id.* at 3.

<sup>14</sup> *Id.* at 3-5.

<sup>15</sup> *Id.* at 4. See n. 27 *infra*.

### III.

#### ARGUMENT

*a. The TRA's Deliberations Rest on the Current State of  
Frontier Communications' CCN*

In its *TRA Petition*, Frontier Communications asserted that the Authority granted it a “statewide” certificate of convenience and necessity as a competing telecommunications provider and that said certificate of convenience and necessity provided Frontier Communications with the “necessary authorization” to provide competing telephone service in areas served by Ben Lomand Cooperative.<sup>16</sup> In sum, as pled the thrust of *Frontier's TRA Petition* rested upon the “statewide” certificate of convenience and necessity.<sup>17</sup> *Frontier's TRA Petition*, however, as shown below, squarely contradicted both Frontier Communications' own understanding of its certificate of convenience and necessity and its recent acknowledgement that an additional order, and perhaps even a court order, would be required before, and if, Frontier Communications could provide the services that it seeks to provide in Ben Lomand Cooperative's service area.

Therefore, the primary threshold question before the Authority in this matter was whether the June 27, 1996, Order<sup>18</sup> (hereinafter “the June 1996 Order”) granted Frontier Communications the authority to provide telephone service throughout the State of Tennessee,

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<sup>16</sup> *Frontier's TRA Petition* at 1. The June 27, 1996, Order, upon which Frontier Communications relied, was issued in *In Re: Application of Citizens Telecommunications Company, D/B/A Citizens Telecom For A Certificate of Convenience and Necessity*, TPSC Docket No. 96-00779.

<sup>17</sup> In its reliance upon the interconnection agreement between Frontier and Ben Lomand Cooperative, Frontier Communications again rested on the June 27, 1996, Order as providing it authority to operate in the area served by Ben Lomand Cooperative. *Frontier's TRA Petition* at 2 (“This Agreement will become effective upon: (a) the issuance of a final order by a regulatory body or court with the requisite jurisdiction to grant Citizens with all necessary regulatory approval and certification to offer local exchange and local exchange access services in the geographic areas to which this Agreement applies[.]”).

<sup>18</sup> See n. 16 *supra*.

without any exceptions.<sup>19</sup> Since, as shown above in the presiding panel's deliberations, the answer to this threshold question was in the negative, *Frontier's TRA Petition* was appropriately dismissed, as a matter of law, as the requested relief was on its face barred and/or for failure to state a claim upon which relief can be granted. It may be that if Frontier Communications had requested the Authority to address a different question, or had proceeded under Tenn. Code Ann. 65-4-201(b), this matter would still be before the TRA.<sup>20</sup> The decision rendered by the Authority on November 7, 2005, does not fall within the proscription of § 253(a).

When the June 1996 Order was issued, Tennessee's Telecommunications Act of 1995 contained a then valid provision that prohibited competition within certain areas within the state.<sup>21</sup> Moreover, other Tennessee statutes prohibited competition within the geographic areas traditionally served by Tennessee telephone cooperatives.<sup>22</sup> Thus, at the time the June 1996 Order was issued, the Tennessee Public Service Commission,<sup>23</sup> as a matter of law, could not have, within the bounds of then existing law, intended that said order granted the applicant "statewide" authority, as that term was construed by Frontier Communications in its *TRA Petition*. At the time that the June 1996 Order was issued, the term "statewide," as it appeared in the May 30, 1996, Initial Order, could have only meant, as a matter of law, "statewide" authority, consistent with then existing law.

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<sup>19</sup> Rather than seeking a declaratory ruling on the question of whether a competing provider can provide telephone service in the geographic area traditionally served by Ben Lomand Cooperative, Frontier Communications asked the Authority for a declaratory ruling "that Frontier [**already**] has the necessary authorization to provide competing telephone services in areas served by Ben Lomand Rural Telephone Cooperative, Inc." *Frontier's TRA Petition* at 1. See also *Frontier's TRA Petition* at 3, ¶ 7; and p. 3, ¶ 9 ("Frontier has already been granted a certificate of convenience to operate statewide") (emphasis added).

<sup>20</sup> See n. 27 *infra*.

<sup>21</sup> Tenn. Code Ann. § 65-4-201(d). This statute was later preempted by the FCC. See *In the Matter of AVR, L.P. d/b/a Hyperion of Tennessee, L.P. Petition for Preemption of Tenn. Code Ann. § 65-4-201(d) and Tennessee Regulatory Authority Decision Denying Hyperion's Application Requesting Authority to Provide Service in Tennessee Rural LEC's Service Areas*, 1999 WL 335803 (F.C.C.), 14 FCC Rcd. 11,064 (May 1999), *pet. for reh'g. den.*, 2001 WL 12939 (F.C.C.), 16 FCC Rcd. 1247 (2001) (hereinafter "*Hyperion Order*").

<sup>22</sup> See, e.g., Tenn. Code Ann. §§ 65-4-101, 65-4-201, 65-29-101 *et seq.*, and 65-29-130.

<sup>23</sup> The Tennessee Public Service Commission was the predecessor agency to the Tennessee Regulatory Authority.

The foregoing conclusions, which were expressed by Director Kyle and adopted by the panel, are bolstered further by both the pre-filed direct testimony submitted by Citizens Telecommunications Company (“Citizens”), now Frontier Communications, in support of its April 1996 application and the proposed Initial Order submitted to the Administrative Law Judge by Citizens on May 20, 1996. The Direct Testimony of Bryan C. Spielman, on behalf of Citizens, contained the following exchange:

Q. Mr. Spielman, are you familiar with T.C.A. § 65-4-201(d)?

A. Yes, I am. I have reviewed and discussed that statutory provision with our counsel. As I understand the provision, incumbent local exchange telephone companies with fewer than 100,000 total access lines in Tennessee are exempt from local exchange competition unless it enters into a voluntary interconnection agreement with a competing telecommunications carrier or applies for authority to provide telecommunications services outside its service area existing on June 6, 1995.<sup>24</sup> (emphasis added).

Moreover, the proposed Initial Order – proposed by Citizens/Frontier Communications itself - provided the following:

The Applicant does not intend to provide service to customers located in areas served by an incumbent local exchange company with fewer tha[n] 100,000 access lines or by a telephone cooperative, unless otherwise permitted by the Commission or by applicable federal or state statutes, rules or regulations.<sup>25</sup> (emphasis added).

Although this language is not within the May 30, 1996, Initial Order issued by the TPSC’s Administrative Law Judge, it evidences, nonetheless, what Citizens (Frontier Communications) considered to be then existing law. In June 1996, Frontier Communications’ own opinion was

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<sup>24</sup> *In Re: Application of Citizens Telecommunications Company, D/B/A Citizens Telecom For A Certificate of Convenience and Necessity*, Direct Testimony of Bryan C. Spielman on Behalf of Citizens Telecommunications Company, D/B/A Citizens Telecom, TPSC Docket No. 96-00779, p. 3 (May 14, 1996).

<sup>25</sup> May 1996, (proposed) Initial Order, p. 3. The ordering clause of the proposed Initial Order provided in part “That the application . . . to provide service statewide, except as such portions of any county which is served by an incumbent local exchange telephone company with fewer than 100,000 total access lines or by telephone cooperatives[.]” *Id.* at 5. (emphasis added). A copy of the May 1996 (proposed) Initial Order is attached hereto as **Exhibit B**.

that a competing provider could not be granted authority by the Tennessee Public Service Commission to provide its services statewide.<sup>26</sup>

In further support of the above, it must not be overlooked that the express language of the 2004 Interconnection Agreement between Frontier and Ben Lomand Cooperative, which is attached to *Frontier's FCC Petition*, further evidences that it was the understanding of the parties that a **prospective** ruling would be required before Section 13.1(a) of said agreement would be satisfied. Specifically, Section 13.1(a) conditions the effectiveness of the agreement upon the subsequent issuance of "a final order by a regulatory body or court with the requisite jurisdiction to grant FCA with all necessary regulatory approval and certification[,]" and Section 13.1 then provides in part as follows:

The Parties recognize that, in the absence of a final order under subsection (a) immediately above, a question of law **exists** with respect to whether the Commission has statutory authority to authorize FCA or any other carrier to provide local exchange and/or local exchange access services in the areas of the State of Tennessee served by BLTC or other telephone cooperatives. Notwithstanding **this uncertainty**, the Parties have acted in good faith to negotiate this Agreement and fulfill their obligations under the Act in order to avoid unnecessary dispute and delay. (emphasis added).

Hence, by the plain language of the above-referenced Interconnection Agreement, and thus the memorialized agreement of the parties, the June 1996 Order did not then, and cannot now, satisfy Section 13.1(a). Not only did Citizens (Frontier Communications) know that it did not have certificated authority to provide service in Ben Lomand Cooperative's territory in 1996 (proposed Initial Order), but Frontier Communications acknowledged the same understanding yet again as late as 2004 (Interconnection Agreement).

As demonstrated above, and as determined by the presiding Authority panel in TRA Docket No. 04-00379, as a matter of law the June 1996 Order did not provide Frontier

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<sup>26</sup> For example, Certificate of Convenience and Necessity orders issued by the TRA during this same time period expressly noted the Tenn. Code Ann. § 65-4-201(d) exemption.

Communications “statewide” authority, as that term was employed in *Frontier’s TRA Petition*. Additionally, neither the May 30, 1996, Initial Order nor the June 1996 Order contain any language indicating that a change of law, in the event such should occur, would be self-effectuating with respect to Frontier Communications’ operating authority in the State of Tennessee.<sup>27</sup>

*b. Frontier’s FCC Petition Is Not Ripe for Consideration*

It is extremely essential to note, if not controlling, that the Authority did not address the question of whether Tennessee’s practice, public policy, and law permit Frontier Communications to provide service in the geographic area traditionally served by Ben Lomand Cooperative, and if not, whether the same is preempted by federal law. Notwithstanding any dicta in the Authority’s deliberations, the Authority’s decision rests solely upon the determination that the current CCN relied upon by Frontier Communications does not provide it with the requisite authority to provide service statewide. The agency has not determined, in TRA Docket No. 04-00379, that Tennessee’s practice, public policy, and law prohibit Frontier Communications from providing service in the area traditionally served by Ben Lomand Cooperative, or whether if so, the same is preempted by federal law. Therefore, *Frontier’s FCC Petition* is, to say the least, premature. Again, the decision rendered by the Authority on

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<sup>27</sup> Tenn. Code Ann. § 65-4-201(b) (“Except as exempted by provisions of state or federal law, no individual or entity shall offer or provide any individual or group of telecommunications services, or extend its territorial areas of operations without first obtaining from the Tennessee [R]egulatory [A]uthority a certificate of convenience and necessity for such services or territory[.]”) (emphasis added). See also, e.g., *In Re: Application of Level 3 Communications, LLC To Expand Its Certificate of Convenience and Necessity To Provide Facilities-Based Local Exchange And Interexchange Telecommunications In All Tennessee Service Areas*, Order Approving Application of Level 3 Communications, LLC, to Amend Its Certificate of Public Convenience and Necessity, TRA Docket No. 02-00230 (June 28, 2002) (Level 3 expressly sought an amended CCN from the TRA with expanded operating authority upon a change of law); and Nov. 2005 TRA Deliberations at 4 (Comments of Director Tate).

November 7, 2005, does not fall within the proscription of § 253(a).<sup>28</sup> The agency merely construed its June 27, 1996 Order, as it was asked, by Frontier Communications, to do.

Surprisingly, in its *FCC Petition*, Frontier claims that “The Tennessee Regulatory Authority (TRA) pursuant to a state statute has ruled that [Frontier], despite having a statewide CLEC certificate of authority, is not permitted to compete as a CLEC in a telephone cooperative’s territory.”<sup>29</sup> Moreover, Frontier alleges that “[t]he requested preemption and declaratory relief are necessary and appropriate because of the obvious anticompetitive impact of the statute and the TRA’s ruling.”<sup>30</sup>

Notwithstanding these bold representations, the two-pronged process established by the Pre-Hearing Officer in TRA Docket No. 04-00379 and the November 2005 deliberations of the presiding Authority panel in the same matter unequivocally evidence that the Authority did not, in fact, address the question of whether Tennessee law currently precludes Frontier Communications from providing service in the geographic area traditionally served Ben Lomand Cooperative. The phantom “ruling” of which Frontier complains simply does not exist.<sup>31</sup>

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<sup>28</sup> In *Frontier’s FCC Petition*, the “challenged requirement” is, presumably, Tenn. Code Ann. § 65-29-102. But, the Authority, as evidenced by the afore-referenced transcript, did not construe this statute. See Nov. 2005 TRA Deliberations.

<sup>29</sup> *Petition of Frontier Communications of America, Inc. for Preemption and Declaratory Ruling*, Summary (Dec. 14, 2005). See also *id.* at 1 (“This Petition arises from the refusal of the [TRA] to allow an [ILEC] affiliate to enter a market as a [CLEC] on an edge-out basis into the territory of an adjoining telephone cooperative.”).

<sup>30</sup> *Id.* at Summary.

<sup>31</sup> In the *Hyperion Order* relied upon by Frontier, the FCC, noting the limitations on its § 253 preemption authority, recognized that “the construction of a state statute by a state commission informs our determination of whether the statute is subject to preemption under section 253.” *Hyperion Order* at ¶ 22, p. 11075. Here, however, there is no “construction of a state statute by a state commission” to inform the FCC because the state commission did not do what Frontier claims it did. Moreover, Hyperion only challenged § 65-4-201(d). Hyperion did not challenge that part of its original Tennessee CCN Order that provided as follows: “Hyperion further stated for the record that it was not seeking authority to serve in territories served by telephone cooperatives.” *In Re: Application of AVR, L.P., d/b/a Hyperion of Tennessee, L.P., for A Certificate of Public Convenience and Necessity to Provide Intrastate Point-to-Point and Telecommunications Access Services within Davidson, Williamson, Maury, Rutherford, Wilson, and Sumner Counties, Tennessee*, TPSC Docket No. 94-00661, p. 3 (Aug. 24, 1995).

In sum, Frontier's misunderstanding of the TRA's deliberations in TRA Docket No. 04-00379 permeates its *FCC Petition*. For instance, Frontier maintains that "the TRA granted Ben Lomand Coop's motion for dismissal on the ground that state law does not permit the TRA to grant authority for CLECs to serve territories served by telephone cooperatives." This is simply not accurate. As shown above, the prevailing, and in fact only, motion during the November 2005 TRA deliberations in TRA Docket No. 04-00379 clearly delineates the Authority's basis for dismissing *Frontier's TRA Petition* – the June 1996 Order, which was based upon then existing law, did not grant Frontier Communications statewide authority. Also as noted earlier, Frontier Communications knew the then-existing limitations of the June 1996 Order when it was issued, and Frontier was aware of the same when it executed the Interconnection Agreement with Ben Lomand Cooperative. Finally, Frontier contends that "[d]espite the Federal statute, the State statute, the Tennessee Attorney General opinion and its own previous findings, the TRA has issued an order improperly exempting a cooperative from competition within its territory[.]"<sup>32</sup> Again, this is inaccurate. The Authority did not issue a ruling that exempts Ben Lomand Cooperative from competition. The Authority merely construed the TPSC's June 1996 Order.<sup>33</sup>

Apparently, Frontier is at odds with the Authority's determination that the Tennessee Public Service Commission's June 1996 Order granting Citizens (Frontier Communications) a certificate of convenience and necessity to provide telecommunications services in Tennessee did not constitute statewide certification. Still, having first voluntarily submitted its request to the jurisdiction of the Authority, and having foregone an appeal of the two-pronged process established by the Pre-Hearing Officer, Frontier should not now be permitted to proceed at the

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<sup>32</sup> *Id.* at 5.

<sup>33</sup> *See* n. 25 *supra*.

FCC as well. Among other things, the principles of comity do not favor such attempts, and neither should the FCC.<sup>34</sup>

#### IV.

#### CONCLUSION

For the foregoing reasons, the Petition of Frontier Communications of America, Inc. for Preemption and Declaratory Ruling pending before the FCC should either be denied or dismissed.

Respectfully submitted,



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<sup>34</sup> The basis of *Frontier's FCC Petition* is that the TRA rendered a ruling that should be preempted by § 253(a). As demonstrated herein, a close review of the record will clearly reveal that said basis is not well grounded. See n. 31 *supra*. Hence, the Intervening Cooperatives do not herein more specifically address § 253(a) and reserve the right to do so, if necessary, at a later time.

### Certificate of Service

I hereby certify that a true and correct copy of the foregoing document has been served via the method set forth below on the following on this the 21<sup>st</sup> day of February, 2006.

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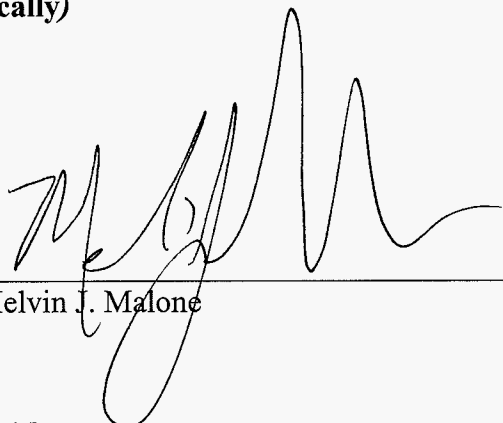
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Melvin J. Malone

# **EXHIBIT A**

BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

May 27, 2005

IN RE:	)	
	)	
PETITION OF FRONTIER COMMUNICATIONS, INC.	)	DOCKET NO.
FOR A DECLARATORY RULING	)	04-00379

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ORDER ESTABLISHING BRIEFING SCHEDULE

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This matter is before the Hearing Officer to establish a procedural schedule in this matter.

**BACKGROUND**

On October 26, 2004, Frontier Communications, Inc. ("Frontier") filed the *Petition of Frontier Communications, Inc. for Declaratory Ruling That It Can Provide Competing Services in Territory Currently Served by Ben Lomand Rural Telephone Cooperative, Inc.* ("Petition")

On December 8, 2004, Ben Lomand Rural Telephone Cooperative, Inc. ("Ben Lomand") filed the *Answer and Motion to Dismiss of Ben Lomand Rural Telephone Cooperative, Inc.* ("Motion to Dismiss"). At a regularly scheduled Authority Conference held on December 13, 2004, the panel assigned to this docket voted unanimously to convene a contested case to determine the issues set forth in the *Petition* and to appoint General Counsel or his designee to prepare the case for a hearing before the panel.<sup>1</sup> On December 29, 2004, Twin Lakes Telephone Cooperative Corporation filed a petition for intervention in this proceeding, which was subsequently granted

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<sup>1</sup> See *Order Convening a Contested Case Proceeding and Appointing a Hearing Officer* (February 16, 2005)

on January 12, 2005.<sup>2</sup> On January 5, 2005, North Central Telephone Cooperative, Inc. ("North Central") filed a *Petition to Intervene*, which was subsequently granted on January 13, 2005.<sup>3</sup>

**APRIL 27, 2005 STATUS CONFERENCE**

At a status conference held on April 27, 2005, the Hearing Officer found that the panel had not addressed the issues contained in the *Motion to Dismiss*.<sup>4</sup> After a lengthy discussion, it was determined that the parties would first file briefs addressing the threshold issues contained in the *Motion to Dismiss* for the panel's consideration.<sup>5</sup> The remainder of the procedural schedule will depend upon the decision by the panel regarding those threshold issues. As a result, the following briefing schedule was established.

**June 8, 2005**

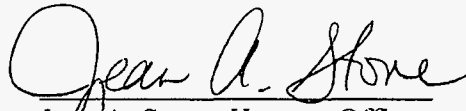
**Initial briefs shall be filed by the parties  
no later than 2:00 p.m.**

**June 15, 2005**

**Reply briefs will be filed by the parties no  
later than 2:00 p.m.**

**IT IS THEREFORE ORDERED THAT:**

A briefing schedule is established as set forth herein

  
Jean A. Stone, Hearing Officer

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<sup>2</sup> See Order Granting *Petition to Intervene* (January 12, 2005)

<sup>3</sup> See Order Granting *Petition to Intervene* (January 13, 2005)

<sup>4</sup> Frontier did not agree with this finding. See Transcript of Proceedings, pp. 3-4 (April 27, 2005)

<sup>5</sup> The Hearing Officer agreed to recommend that the panel consider this matter at the scheduled June 27, 2005 Authority Conference

# **EXHIBIT B**

STOKES & BARTHOLOMEW

A PROFESSIONAL ASSOCIATION  
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REC'D TN. PUBLIC  
SERVICE COMM.  
6 MAY 20 AM 9 57  
OFFICE OF THE  
EXECUTIVE DIRECTOR

CHARLES W. COOK III

WRITER'S DIRECT DIAL 259-1456

May 20, 1996

VIA HAND DELIVERY

Eddie Roberson, Executive Director  
Tennessee Public Service Commission  
460 James Robertson Parkway  
Nashville, Tennessee 37243-0505

**OFFICIAL FILE**

**PLEASE**

RE: Citizens Telecommunications Company  
d/b/a Citizens Telecomm

**DO NOT REMOVE**

Dear Mr. Roberson:

Enclosed please find the original and ten copies of the Initial Order in connection with the above-referenced matter.

For your convenience, I have enclosed a self-addressed stamped envelope for the return of one file-stamped copy of the Initial Order.

Should you have any questions, please do not hesitate to contact me.

Sincerely,

STOKES & BARTHOLOMEW, P. A.

*Charles W. Cook III*

Charles W. Cook, III

CWCIII:ncj

Enclosures as stated

**RECEIVED**

MAY 20 1996

TN PUBLIC SERVICE COMM.  
UTILITY RATE DIVISION

96 MAY 20 AM 9 57  
OFFICE OF THE  
EXECUTIVE DIRECTOR

BEFORE THE TENNESSEE PUBLIC SERVICE COMMISSION  
NASHVILLE, TENNESSEE  
May 15, 1996

IN RE: APPLICATION OF CITIZENS TELECOMMUNICATIONS COMPANY,  
D/B/A CITIZENS TELECOM FOR A CERTIFICATE OF PUBLIC  
CONVENIENCE AND NECESSITY AS COMPETING  
TELECOMMUNICATIONS SERVICE PROVIDER

Docket No. 96-00779

INITIAL ORDER

This matter is before the Tennessee Public Service Commission upon the application of Citizens Telecommunications Company, d/b/a Citizens Telecom (hereinafter the "Applicant" or "Citizens Telecom") for a Certificate of Public Convenience and Necessity ("Certificate") to become a Competing Telecommunications Service Provider as defined by T.C.A. §65-4-101(e). The Applicant has filed this application as a Competing Telecommunications Service Provider pursuant to Section 7 of Chapter 408 of the Public Acts of 1995, codified as T.C.A. §65-4-201(e). Applicant seeks authority to operate statewide and to provide a full array of telecommunications services as would normally be provided by an incumbent local exchange telephone company. Application requests a Certificate to offer these services on a statewide basis but, in accordance with the limitations described in T.C.A. §65-4-201(d), Applicant does not, by this application, seek authority to provide service to any customers located in areas served by incumbent local exchange carriers with fewer than 100,000 total access lines or by a telephone cooperative, except as otherwise permitted by the Commission or applicable federal or state statute, rule, or regulation.

Notice of this application has been served upon incumbent local exchange carriers and other interested parties.

The matter was heard on May 15, 1996, in Nashville, Tennessee, before Ralph B. Christian, II, Administrative Judge, at which time the following appearances were entered:

**APPEARANCES:**

CHARLES W. COOK, III, Attorney at Law, STOKES & BARTHOLOMEW, P.A.  
424 Church Street, Suite 2800, Nashville, Tennessee 37219, appearing on behalf of the Applicant.

BRYAN C. SPEILMAN, Group Product Manager - Local Products - for Citizens Utilities, Applicant's parent company, testified in support of the application.

No other witnesses testified. No parties opposed the application. BellSouth Telecommunications, Inc. filed a Motion to Intervene, but did not otherwise enter an appearance or oppose the application.

Based upon the application, the testimony and exhibits presented at the hearing and the entire record of this proceeding, I find that the requested certificate should be granted. In support of those decisions, I hereby make the following findings of fact and conclusions of law:

Citizens Telecom seeks authority to offer within its certificated area all legally allowed telecommunications services. Such services include, but are not limited to, those normally provided by an incumbent local exchange telephone company, local exchange and exchange access services, dedicated and switched access services and private line services, Centrex services, measured business lines, voice mail, ISDN, and vertical factors. Applicant also intends to expand the scope of its interexchange retail authority, awarded in Case No. 95-03786. Mr. Speilman testified that this expansion may be necessary because the Applicant is

installing long distance switching capacity in Powell, Tennessee.

Mr. Speilman stated that Applicant's services will be conducted through the use of owned and leased facilities, resale of other local exchange carrier's retail products and the use of unbundled network elements obtained from incumbent local exchange carriers.

Mr. Speilman testified that Applicant will adhere to all applicable Commission policies, rules and orders. The Applicant does not intend to provide service to customers located in areas served by an incumbent local exchange company with fewer than 100,000 access lines or by a telephone cooperative, unless otherwise permitted by the Commission or by applicable federal or state statutes, rules or regulations. Mr. Speilman stated that the two Citizens incumbent local exchange carriers do not claim entitlement to the exemptions from competition contained in T.C.A. §65-4-201(d).

Applicant is a Delaware corporation authorized to do business in the State of Tennessee. It is currently certified as an interexchange reseller in Tennessee. It is headquartered in Stamford, Connecticut. Applicant was originally created to provide interexchange services throughout the United States.

Applicant is a subsidiary of Citizens Utilities Company, a publicly-traded Delaware Corporation which is the parent corporation of a number of local exchange carriers conducting operations in twelve (12) states. Two of those companies, Citizens Telecommunications Company of Tennessee, LLC and Citizens Telecommunications Company of the Volunteer State, LLC conduct local exchange operations in Tennessee. Citizens Utilities and its subsidiaries are also referred to as the "Citizens Utilities Company family of local exchange providers".

Mr. Speilman avers that Applicant's principal corporate officers have substantial managerial experience in the telecommunications field. Mr. Speilman testified that the Citizens Utilities Company, through its family of local exchange carriers, and Applicant has operated in this state since 1993. Its management and technical capabilities, as are more fully described in its application, are well-known to the Commission. Mr. Speilman further testified that Applicant is funded from advances from Citizens Utilities Company, whose financial strength is demonstrated in the 1995 audited financial statements found in its 1995 Annual Report.

Based upon the facts as described in the Applicant's application and exhibits including, but not limited to, Citizens Utilities Company's 1995 Annual Report and in the testimony of Mr. Speilman, I find that the Applicant possesses sufficient managerial, financial and technical ability to provide the telecommunications services it proposes. Therefore, the Applicant meets the statutory criteria for the award of operating authority as a Competing Telecommunications Service Provider under T.C.A. §65-4-201(c).

In accordance with Section 16 of Chapter 408, Applicant has filed a small and minority owned telecommunications businesses participation plan. The plan, filed on or about April 25, 1996, fulfills the statutory requirements of Section 16. Mr. Speilman testified that the Applicant is committed to implementation of the plan.

Approval of the application will serve the public interest by creating greater competition in the intrastate telecommunications marketplace. In particular, the public will

benefit both directly, through the use of competitive telecommunications services to be offered by the Applicant, and indirectly because the presence of the Applicant in the market will increase the incentives for other telecommunications services providers, including the incumbent local exchange carrier, to operate more efficiently, offer more innovative services, and improve the quality of service.

**WHEREFORE**, based upon the foregoing findings and conclusions, I find that the public convenience and necessity will be served by the issuance of a certificate to the Applicant.

**IT IS THEREFORE ORDERED:**

1. That the application of Citizens Telecommunications Company, D/B/A Citizens Telecom for a certificate of public convenience and necessity as a competing telecommunications service provider pursuant to Section 7 of Chapter 408 of the Public Acts of 1995, T.C.A. §65-2-201(c), to provide service statewide, except as such portions of any county which is served by an incumbent local exchange telephone company with fewer than 100,000 total access lines or by telephone cooperatives, except as otherwise permitted by the Commission or applicable federal or state statute, rule or regulation, is hereby **granted**;

2. That the Citizens Telecommunications Company, D/B/A Citizens Telecom is authorized to offer all of the services that may be provided by a Competing Telecommunications Service Provider, as that term is defined in Section 3 of Chapter 408, T.C.A. §65-4-101(e); those services include, but are not limited to, toll, local exchange, access, private line, paging and enhanced services, Centrex services, measured business lines, voice mail, ISDN, and vertical factors ;

3. That the Citizens Telecommunications Company, D/B/A Citizens Telecom may not provide service to customers served by an incumbent local exchange telephone company with fewer than 100,000 total access lines or by an a telephone cooperative, except in accordance with T.C.A. §65-4-201(d), or as authorized by the Commission or applicable federal or state statute, rule, or regulation;

4. That the Citizens Telecommunications Company, D/B/A Citizens Telecom may commence service under its certificate once it has filed proper tariffs for service to be offered and such other information required by the Commission;

5. That any party aggrieved by the Commission's decision in this matter may file a petition for Reconsideration with the Tennessee Public Service Commission within ten (10) days from and after the date of this Order.

6. That any party aggrieved by the Commission's decision in this matter may file a Petition for Review in the Tennessee Court of Appeals, Middle Section, within sixty (60) days from and after the date of this Order.

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RALPH B. CHRISTIAN, II  
ADMINISTRATIVE JUDGE